

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WINBUSH,

Defendant-Appellant.

UNPUBLISHED

August 24, 1999

No. 203442

Recorder's Court

LC No. 96-004881

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

CAVANAGH, J. (*concurring*).

I agree with the majority that because defendant failed to object to the admission of the identification testimony below and the error was not decisive of the outcome, his convictions should be affirmed. See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). However, I write separately to express my opinion that the on-the-scene identification violated defendant's right to counsel as established in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973).

In *Anderson*, the Supreme Court stated that counsel is not required at "prompt, 'on-the-scene' corporeal identifications within minutes of the crime," see e.g., *Russell v United States*, 133 US App DC 77; 408 F2d 1280 (1969)" (underlined emphasis added). *Anderson, supra* at 187, n23. This Court has held that "it is proper and does not offend the *Anderson* requirements for the police to promptly conduct an on-the-scene identification" (emphasis added). *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

Random House Webster's College Dictionary, p 1042, defines "prompt" as "done performed, delivered, etc., at once or without delay." In *Russell, supra*, on which the *Anderson* Court relied, the court specifically stated that its holding "approves only those on-the-scene identifications which occur within *minutes* of the witnessed crime" (emphasis added). *Russell, supra*, at 81, n 20. In *Russell*, the time lag between the crime and the on-the-scene identification appears to have been approximately thirty minutes. See *id.* at 80, 82. In subsequent cases relying on *Russell*, federal courts have found admissible evidence of on-the-scene identifications occurring within an hour or less of the time of the crime. See, e.g., *United States v King*, 148 F3d 968, 970 (CA 8, 1998) (one hour); *United States v Mohammed*, 27 F3d 815, 822 (CA 2, 1994) (ten minutes); *United States v Singleton*, 226 US App

DC 422, 429; 802 F2d 1159 (1983) (two or three minutes); *United States v Purry*, 178 US App DC 139, 143; 545 F2d 217 (1976) (thirty minutes). Although the *Winters* Court did not specify how much time had elapsed between the crime and the identification at issue, it stated that the latter took place “within minutes after the shooting occurred.” See *Winters, supra* at 728-729.

In contrast, in the instant case the shooting occurred at approximately 12:30 to 12:45 p.m., and the on-the-scene identification took place at approximately 3:00 p.m. Thus, two-and-a-quarter to two-and-a-half hours elapsed between the time of the shooting and the challenged identification procedure. I cannot conclude that this identification occurred “promptly” or “within minutes of the witnessed crime.” See *Anderson, supra* at 187, n 23; *Winters, supra* at 727. Accordingly, I would find that the right to counsel established in *Anderson, supra*, was violated, and evidence of the identification should not have been admitted.

However, considering the other evidence presented at trial, I conclude that this unpreserved, nonconstitutional¹ error does not require reversal of defendant’s convictions. Moreover, I agree with the majority that defendant was not denied due process because the police did not test his hands and clothing for gunpowder residue. Accordingly, I concur with the result reached by the majority.

/s/ Mark J. Cavanagh

¹ The Supreme Court has acknowledged that its holding in *Anderson* was not required by the federal constitution:

The . . . *Anderson* rules . . . represent the conclusion of this Court, independent of any Federal constitutional mandate, that, both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification [*People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1974) (footnote omitted).]

Likewise, the *Anderson* rules are not mandated by the Michigan constitution. See *Winters, supra* at 723.